

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

50934  
97532

FILE: B-183603

DATE: September 16, 1975

MATTER OF: Control Power Systems, Incorporated

## DIGEST:

1. Allegation made after bid opening that IFB contains unrealistic delivery provision is untimely, since Bid Protest Procedures provide that apparent improprieties in solicitations must be protested prior to bid opening.
2. Bid accompanied by letter from bidder stating that it could not meet mandatory drawing delivery date was properly rejected as nonresponsive, since bid failed to conform to essential delivery requirement of IFB. However, agency is advised to ascertain feasibility of delivery requirement prior to its use in future procurements as post-award developments indicate it may not be capable of fulfillment.

Invitation for bids (IFB) No. DS-7099, issued by the Department of Interior, Bureau of Reclamation (Bureau), solicited bids for the supply of duplex and enclosed switchboards for the Sioux City and Watertown substations, Pick-Sloan Missouri Basin Program. The IFB, as amended, established February 27, 1975, as the date for bid opening, at which time seven bids were received and opened. Control Power Systems, Inc. (CPS), submitted the low bid in the amount of \$231,307. United Power & Control Systems, Inc. (United Power), submitted the second low bid in the amount of \$231,458. Following the rejection of the low bid submitted by CPS as nonresponsive, on April 3, 1975, the Bureau awarded the contract to United Power. By telegram of April 7, 1975, CPS protested to this Office the Bureau's rejection of its bid.

Among the "Special Conditions" of the solicitation was Section 1.2.2, entitled "Drawings and Data to be Furnished by the Contractor," which set out delivery requirements for those items, including a requirement that equipment layout drawings be furnished within 60 days after award. It was important that the drawings be timely delivered and approved because they were to be used by other contractors who were to install the equipment furnished under the instant contract. CPS submitted with its bid a letter which stated that it could not comply with the 60-day requirement for the drawings but that it would furnish the layout drawings 22 weeks after award and could timely deliver the end equipment.

In its report to this Office, the Bureau explained as follows, why it regarded the CPS bid as nonresponsive:

"This stipulation is a deviation from the requirements of paragraph 1.2.2., 'Drawings and Data to be Furnished by the Contractor,' which sets out the time frames for submission of equipment layout, schematic diagrams, and wiring diagrams. The contractor is required to submit for approval equipment layout drawings within 60 calendar days after receipt of notice of award. Schematic diagrams are then to be submitted for approval within 60 calendar days after return of the approved equipment layout drawings. Wiring diagrams are to be submitted for approval within 60 calendar days after first approval of the schematic diagrams.

"These drawings and diagrams are required for use in the construction of the modifications to the Sioux City and Watertown Substations. The construction contractors must have the information contained in the layout, schematic, and wiring diagrams to plan for and to complete the installation of the equipment purchased under Solicitation No. DS-7099.

"The time frame for submission of the layout drawings, schematic, and wiring diagrams was established to avoid delaying the construction contractors for the Watertown and Sioux City Substations modifications, and possibly subjecting the Government to claims resulting from these delays."

The threshold issue is whether CPS' protest is timely. The Bureau is of the opinion that the CPS protest is untimely, since the "Government was not advised of possible drawing submittal requirement deficiencies by any of the offerors or potential equipment suppliers prior to the offer opening." In this connection, our applicable bid protest procedures require that protests based on solicitation defects which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 20.2(a) (1974 ed.). Since CPS' protest was filed after bid opening, we believe the protest is untimely insofar as it is directed against alleged defects in the solicitation.

The sole remaining issue is whether the CPS bid was properly rejected as nonresponsive. Federal Procurement Regulations (FPR) § 1-2.404-2(a) (amend. 121 Nov. 1973) provides that any bid which fails to conform to the essential requirements of the invitation for bids must be rejected as nonresponsive. Ordinarily, a bid must be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit rights of the Government under any contract clause or limit its liability to the Government so as to give such bidder an advantage over other bidders. FPR § 1-2.404-2(b)(5) (amend. 121 Nov. 1973).

Objectionable conditions may be deleted under the regulation only where they do not go to the substance, as distinguished from the form, of the bid. A condition goes to the substance of the bid when it affects price, quantity, quality, or delivery of the items offered. FPR § 1-2.405 (1964 ed.) provides that a bidder shall either be given an opportunity to cure any deficiency resulting from a minor informality or irregularity, or the contracting officer shall waive such deficiency. However, this provision defines a minor informality or irregularity as an immaterial and inconsequential defect when its significance as to price, quantity, quality, or delivery is trivial or negligible, the correction or waiver of which would not be prejudicial to other bidders.

The protester offered to furnish layout drawings for approval 22 weeks, or 154 days, after award in lieu of the 60 days required by the IFB. Even if we accept the protester's statement that this delay would not affect the timely delivery of the equipment being procured, in view of the fact that the drawings are needed by other contractors, we do not think the deviation could be waived as a minor informality. Moreover, since United Power took no exception to the solicitation provisions it was properly considered responsive and awarded the contract.

We have been advised by the agency that the drawings were in fact furnished by the contractor on August 8, 1975, which is later than the 60 days required under the contract, but earlier than the 22 weeks offered by the protester. It therefore appears that the protester may be correct in his contention made after the award that the only two suppliers in the United States (Westinghouse and General Electric) for this equipment require more than 60 days to furnish the requisite drawings. However, revelation of this apparent fact after the award does not affect its validity where none of the other six bidders took any exception to the delivery requirement

B-183603

and the only information conveyed to the agency was CPS's statement with its bid that "our supplier \* \* \* will require 22 weeks \* \* \*." We are advising the agency, however, that prior to the use of the same or a similar requirement in future procurements it should be ascertained whether the requirement is capable of fulfillment.

  
Deputy Comptroller General  
of the United States